TOPICAL INDEX TO BRIEF

	Page
INTRODUCTION	1
QUESTIONS PRESENTED	2
STATEMENT OF THE CASE	3
ARGUMENT	
I	7
II	16
III	19
IV	22
CONCLUSION	25

AUTHORITIES CITED

	Page
Abel v. United States, 362 U.S. 217 (1960)	13
Agnello v. United States, 269 U.S. 20 (1925)	15
Barnes v. United States, 341 F. 2d 189 (C.A. 5th 1965)	18
Beck v. Ohio, 379 U.S. 89 (1964)	15
Brady v. United States, 39 F. 2d 312, 313 (C.C.A. 8th 1930)	23
Carroll v. United States, 367 U.S. 132, 158 (1925)	13
Crum v. State, 172 So. 2d 24 (Fla. App. 1965)	10
Elkins v. United States, 364 U.S. 206 (1960)	13
Estes v. Texas, 381 U.S. 532, 542 (1965)	20
Flaherty v. State, 183 So. 2d 607 (Fla. App. 1966)	19
Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931)	8
Gorin v. United States, 313 F. 2d 641, 646 (C.A. 1st 1963)	23
Griffin v. California, 380 U.S. 609 (1965)	17
Harris v. United States, 331 U.S. 145 (1947)	13

AUTHORITIES CITED (cont.)

	Page
Honig v. United States, 208 F. 2d 916 (C.A. 8th 1953)	8
Jackman v. State, 140 So. 2d 627 (Fla. App. 1962)	23
Jackson v. State, 132 So. 2d 596 (Fla. 1961)	9
Jeffers v. United States, 187 F. 2d 498 (C.A.D.C. 1950)	13
Johnson v. New Jersey, 384 U.S. 719 (1966)	13
Ker v. California, 374 U.S. 23 (1963)	8
Landsdown v. United States, 348 F. 2d 405 (C.A. 5th 1965)	10
Manson v. State, 88 So. 2d 272 (Fla. 1956)	23
Marshall v. United States, 360 U.S. 310 (1959)	21
McAbee v. United States, 294 F. 2d 703 (C.A.D.C. 1961)	18
Miranda v. Arizona, 384 U.S. 436 (1966)	18
Myrick v. State, 177 So. 2d 845, 847 (Fla. App. 1965)	9
Nicholson v. United States, 355 F. 2d 80 (C.A. 5th 1966)	18
Opper v. United States, 348 U.S. 84 (1954)	23

AUTHORITIES CITED (cont.)

	Page
Preston v. United States, 376 U.S. 364 (1964)	15
Real v. United States, 326 F. 2d 441 (C.A. 10th 1964)	18
Rideau v. Louisiana, 373 U.S. 723 (1963)	20
Ruhl v. United States, 148 F. 2d 173 (C.C.A. 10th 1945)	8
San Fratello v. State, 154 So. 2d 327 (Fla. App. 1963)	10
Shaffer v. United States, 221 F. 2d 17 (C.A. 5th 1955)	23
Sheppard v. Maxwell, 384 U.S. 333 (1966)	21
Shores v. United States, 174 F. 2d 838, 845 (C.A. 8th 1949)	8
Silverthrone Lumber Co. v. United States, 251 U.S. 385 (1920)	15
Singleton v. State, 183 So. 2d 245, 251, 252 (Fla. App. 1966)	19
Slater v. State, 90 So. 2d 453 (Fla. 1956)	9
Steele v. United States, 267 U.S. 505 (1925)	9
Tatum v. United States, 321 F. 2d 219 (C.A. 9th 1963)	11

AUTHORITIES CITED (cont.)

	Page
United States v. Accardo, 298 F. 2d 133 (C.A. 7th 1962)	22
United States v. Echeles, 352 F. 2d 892 (C.A. 7th 1965)	23
United States v. Haupt, 136 F. 2d 661 (C.A. 7th 1943)	23
United States v. Kahaner, 203 F. Supp. 78 (D.C.N.Y. 1962)	23
United States v. Kahn, 381 F. 2d 824 (C.A. 7th 1967)	23
United States v. Lee, 308 F. 2d 715 (C.A. 4th 1962)	13
United States v. MacLeod, 207 F. 2d 853 (C.A. 7th 1953)	8
United States v. Mitchell, 322 U.S. 65 (1944)	8, 9
United States v. Page, 302 F. 2d 81 (C.A. 9th 1962)	9
United States v. Rabinowitz, 339 U.S. 56, 66 (1950)	11
United States v. Shaffer, 291 F. 2d 689 (C.A. 7th 1961)	21
United States v. Smith, 209 F. Supp. 907, 914 (D.C. Ill. 1962)	23

AUTHORITIES CITED (cont.)

	Page
United States v. United States Gypsum Co. 333 U.S. 364 (1947)	9
Warden v. Hayden, 87 S.CT. 1642 (1967)	14
Wilson v. United States, 162 U.S. 613 (1896)	18
Young v. Slate, 203 So. 2d 650	18

STATUTES

Federal:

Rule 14, 41 (e), Federal Rules of Criminal Procedure, 18 U.S.C.A.	9

Florida:

Section 918.09, Florida Statutes, F.S.A.	18

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

NO.——

DOMINICK ANGEL BRETTI,

Petitioner,

vs

THE STATE OF FLORIDA,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeal of Florida, Third District

---

BRIEF OF RESPONDENT

INTRODUCTION

The petitioner was the defendant in the trial court and the appellant in the District Court of Appeal, Third District of Florida. The respondent was the plaintiff and appellee, respectively, below. The parties will be referred to as they stand before this Court and the symbol "SR" refers to the transcript of the motion to suppress and "R" refers to the trial transcript. All emphasis has been supplied unless the contrary is indicated.

QUESTIONS PRESENTED

Respondent respectfully rephrases the issues presented in the petition for writ of certiorari.

I

Whether petitioner was denied due process of law when the trial court resolved a conflict of fact on a motion to suppress and admitted evidence seized during a search, which, the court determined, had been made pursuant to petitioner's free and voluntary consent?

II

Whether the prosecutor's comment that petitioner had not given a reasonable explanation for possession of recently stolen property, expressly directed to the time when petitioner was found in possession, amounts to an indirect comment on his right to remain silent at trial?

III

Whether the totality of circumstances sub judice reflect that petitioner was denied a fair trial due to prejudicial pre-trial publicity?

IV

Whether the trial court abused its discretion in refusing to sever the trials of three defendants who had participated in a closely interwoven, tri-partite scheme of robbery where no showing was made that "prejudice" did in fact result or that such alleged "prejudice" would

have been eliminated if petitioner had been tried separately?

STATEMENT OF THE CASE

Because respondent takes issue with the petitioner's version of the facts, the following is submitted:

On the evening of February 9, 1965, at approximately 9:00 o'clock P.M., two men wearing fedora hats and dark glasses gained entrance to the home of Dr. and Mrs. Traub. At that time, the Traub's were entertaining a houseguest, Mrs. Janet Fritzel. The two men drew pistols, then tied and gagged Dr. Traub and Mrs. Fritzel. The house was ransacked and the men left with a quantity of jewelry and furs belonging to Mrs. Traub and Mrs. Fritzel. During the course of the robbery, a third man appeared but only his feet were visible to Dr. Traub and Mrs. Fritzel. Both Dr. Traub and Mrs. Fritzel identified one Ghelfi and one Antone as the two men who tied, gagged and robbed them (SR 91-93, R 216-217).

During the course of the robbery, a detective upon routine patrol in the area, received a radio message that there was some trouble at the Traub residence and consequently proceeded in that direction. Detective Brooks testified that he noticed a 1964 Falcon containing three men leaving the scene. He further testified that he was able to identify Ghelfi as one of the occupants and that he wrote down the license number of the Falcon which he checked out over his police radio (SR 105-109).

Officer Vitt testified that at approximately the same time Detective Brooks approached the Traub residence, he

approached the area and noticed a Falcon containing three men leaving the vicinity. His lights shone on the occupants of the car and he "got a good look at the driver." He likewise jotted down the license number and then proceeded towards the house (SR 115). Officer Vitt identified the driver of the vehicle as one Antone (SR 115).

The Falcon in question was discovered at approximately 5:00 o'clock A.M., on the morning of February 10th in the parking lot of the Apache Motel (SR 72). Mr. Joseph Bartz, an occupant of the motel, testified that earlier that evening (approximately 9:00 o'clock P.M.) he observed three men get out of a Cadillac in the parking lot of the Apache Motel and leave in the Falcon. Sometime later that evening he saw three men return, remove a bundle from the trunk of the Falcon and place it into the trunk of the Cadillac. The three men departed in the Cadillac. Bartz wrote down the license number of the Cadillac and furnished it to the police when they arrived at the parking lot (R 413-450).

The police officers ran a check on the license tag of the Cadillac and it was determined that the said vehicle was owned by Antone. Thereupon at or about 5:30 o'clock A.M. on the morning of February 10th, Captain Morgan, Detective Minium, Detective Fowler and several other police officers testified that they knocked on the door of Antone's apartment and received no answer. Captain Morgan knocked again and Detective Minium walked to the window and yelled "police officers". After again receiving no response, Captain Morgan tried the door, walked to the window and yelled "police officers" as did Detective Minium. After again receiving no response,

Captain Morgan tried the door, found it open and entered the apartment followed by the other detectives (SR 69-70, R 480, 486-487). Captain Morgan testified that he went to Antone's apartment for the specific purpose of arresting Mr. Antone (R 486).

The police officers remained in Antone's apartment and at approximately 11:00 o'clock A.M., petitioner and his two co-defendants entered the apartment where they were immediately placed under arrest. Following the arrest, they were searched and found to be unarmed. [Antone's apartment was allegedly searched prior to the arrest. However, no evidence was uncovered and nothing was seized.] Captain Morgan then inquired how they arrived at the apartment and Ghelfi stated that they had used his car and that it was parked downstairs. As Captain Morgan testified: "I went downstairs with Ghelfi to his car, a Cadillac convertible, white in color, and I asked him, I said, 'Have you any objections if I look it over?' And he said 'No.'" (SR 81). Following a search of the car, a brown bag was discovered under the front seat which contained some of the jewelry which had been stolen from Mr. Traub's home. A subsequent search of Ghelfi's home, with his consent, uncovered two pistols and a chest containing a torch and various tools (SR 86-88).

After obtaining his consent, Antone's automobile was likewise searched and a pillow case containing some of the furs stolen from the Traub home was discovered. Later in the day, a subsequent search of the Antone vehicle revealed two pistols (SR 82-86).

Officer Bishop testified that he and Detective Ford

went with petitioner to a service station of the 79th Street Causeway where they searched his car after obtaining his permission (SR 100). Nothing was found. Petitioner then took the officers to his apartment where he consented to a search (SR 100) and as the record reflects:

> "Q [Prosecutor] Did you open the door?
> A [Bishop] He opened the door. He had the key.
>
> Q What happened when you got inside?
> A In regards to what we were looking for, furs and jewels, we found none. However, we found a driver's license on top of the bureau that was of another name. We asked him about this driver's license. He said he knew nothing about it; it wasn't his." (SR 101).

This driver's license which had never been issued to Joseph Anello had been missing from the North Dade Auto Tag Agency since February 15, 1964 (R 626-628).

A clerk at Merlin-Rent-A-Car Agency identified petitioner as the man who had rented the Falcon automobile from the agency on the afternoon of February 9th after presenting the Anello driver's license for identification (R 698).

Based on the foregoing, the jury returned a verdict of guilty on November 6, 1965 (R 1190). Petitioner was sentenced to a term of fifteen years in the State penitentiary (R 1191-1194).

The circumstances surrounding the allegedly prejudicial comment of the prosecutor, pre-trial publicity and severance issues will be discussed in the Argument section, infra.

ARGUMENT

In each of petitioner's four reasons for granting the writ, he seeks to convince this Court that the District Court of Appeal, Third District of Florida, decided a Federal question of substance "in a way probably not in accord with applicable decisions of this Court," and as a consequence, petitioner was allegedly denied a title, right, privilege or immunity claimed under the Constitution or Statutes of the United States.

Respondent's brief in opposition demonstrates that the decision of the district court below was in complete harmony with applicable Federal law. Manifestly, there is no important question of Federal law requiring decision by this Court.

I

APPLICABLE FEDERAL LAW IS CONSISTENT WITH THE FINDING OF THE DISTRICT COURT THAT THE SEARCH AND SEIZURE WAS REASONABLE.

The thrust of petitioner's first argument is that harmful evidence which lead to his conviction was the product of an unreasonable search and seizure, measured

by the standard set in **Ker v. California**, 374 U.S. 23 (1963).

This Court has pointed out that the test of reasonableness cannot be stated in rigid and absolute terms:

> "Each case is to be decided on its own facts and circumstances." **Go-Bart Importing Co. v. United States**, 282 U.S. 344 (1931).

Petitioner's argument develops that harmful evidence was seized following an arrest not based upon probable cause, without a search warrant and without express consent.

Of these contentions only the last, the search by consent, raises a ground upon which the Florida courts and respondent have relied to establish the legality of the seizure.

A. Consent to Search

It is, of course, axiomatic that one may consent to a search without a search warrant. **United States v. MacLeod**, 207 F. 2d 853 (C. A. 7th 1953); **Honig v. United States**, 208 F. 2d 916 (C. A. 8th 1953); **Shores v. United States**, 174 F. 2d 838, 845 (C.A. 8th 1949); **Ruhl v. United States**, 148 F. 2d 173 C.C.A. 10th 1945). Indeed, it has been long established that one can validly consent to a search, even though the consent be given while the defendant is in custody, as in the case sub judice, **United States v. Mitchell**, 322 U.S. 65 (1944).

Whether such consent has been given, freely and

voluntarily is, in the first instance, a question of fact for the trial court under Florida and Federal law. (See Rule 41 (e), Rules of Criminal Procedure, 18 U.S.C.A. "The judge shall receive evidence on any issue of fact necessary to the decision of the motion to suppress"); **United States v. Page,** 302 F. 2d 81 (C.A. 9th 1962); **United States v. Mitchell,** 322 U.S. 65 (1944); **Steele v. United States,** 267 U.S. 505 (1925).

It also is settled in Florida that conflicting evidence concerning consent to search does not require a finding of an illegal search and the absence of consent thereto. **Jackson v. State,** 132 So. 2d 596 (Fla. 1961). Moreover, the trial judge was "authorized to discredit the testimony of the [petitioner] in its entirety", **Slater v. State,** 90 So. 2d 453, (Fla. 1956), and to find that it was not "susceptible of belief". **Myrick v. State,** 177 So. 2d 845, 847 (Fla. App. 1965):

> "Mere conflict of evidence does not preclude a finding that consent was freely and voluntarily given." **Myrick v. State,** supra, at 848. See also, **Yant v. State,** (Fla. App. 1963), 154 So. 2d 908.

In reviewing the trial court's determination regarding consent to search, this Court applies the "clearly erroneous" rule. **United States v. Page,** supra. As elucidated in **United States v. United States Gypsum Co.,** 333 U.S. 364 (1947):

> "A finding is 'clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the defi-

nite and firm conviction that a mistake has been committed."

It is fairly obvious that the evidence of consent, adduced at trial and passed upon by the judge and appellate courts in accord with the federal prescription, can hardly produce "the definite and firm conviction that a mistake has been committed".

Officer Jerry Bishop testified that petitioner consented to a search of his automobile and motel room (SR 99-101). Petitioner denied having given consent to the search of his automobile or his motel room (SR 34-36). [It was during the search of petitioner's room that officers discovered the driver's license used to rent the Falcon in the name of Joseph Anello].

This conflicting testimony was considered by the trial judge at the hearing on the motion to suppress. He had occasion to observe the demeanor of the witnesses face to face; certainly a better position than the appellate court to determine who was and who was not telling the truth. Further, on appeal from a judgment of conviction, the evidence must be considered in the light most favorable to the prosecution. **Landsdown v. United States,** 348 F. 2d 405 (C.A. 5th 1965); See also **Crum v. State,** 172 So. 2d 24 (Fla. App. 1965); **San Fratello v. State,** 154 So. 2d 327 (Fla. App. 1963).

Reasonable inferences from the evidence augment the trial court's finding of consent: Before this Court, petitioner suggests that his consent to search was a result of coercion and intimidation. However, **at trial,** when asked whether he had given the officers permission to

search his room, he replied simply in the negative: "No, I didn't (SR 36). **At trial,** petitioner did not testify that he was coerced into giving permission for the search of his motel room and it now seems highly inconsistent to so argue. [The record reference, SR-30, when guns were used, speaks to an incident **before they arrived at petitioner's room,** about one hour earlier (SR 36). The record does not reflect that force or intimidation were used **when consent was given**].

Moreover, there is no reason why petitioner should not have given his consent. No fruits of the crime were found (SR 101). Petitioner well knew, though the police had probable cause to believe otherwise, that his room did not contain the furs and jewels sought. Under these circumstances, consent to what he thought would be a futile search, was an ingratiating gesture most certain to avert suspicion.

Besides the petitioner's testimony, there is absolutely no testimony or other evidence that his consent to the search was not genuine or was reluctantly given. See **Landsdown v. United States,** supra. Petitioner rests his case on his assertion that he did not freely consent. The trial court did not believe him. There is abundant evidence to support that determination, hence it is not "clearly erroneous." See **Tatum v. United States,** 321 F. 2d 219 (C.A. 9th 1963).

It is no answer to assert, as petitioner has, that the police could have obtained a search warrant, for "[T]he relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable." **United States v. Rabinowitz,** 339 U.S. 56, 66 (1950).

B. Proper Seizure

It is clear that the search was made pursuant to petitioner's consent. The question narrows to whether the item seized was the proper subject of a lawful seizure. One of the officers making the search testified:

> "Q What happened when you got inside?"
> "A In regards to what we were looking for, furs, and jewels, we found none. However, we found a driver's license on top of the bureau that was of another name. We asked him about this driver's license. He said he knew nothing about it; it wasn't his" (SR 101).

Officer John Henry Ford testified that petitioner gave his voluntary consent (R 560-561) to a search of his motel room. Officer Ford's purpose for making the search "was to check for jewels **and things stolen in the robbery that was under investigation**" (R 562). He discovered the driver's license in plain view:

> "**THE WITNESS:** I found a driver's license on top of the refrigerator in the name of Joseph Anello. I asked Mr. Bretti if this was his driver's license. He stated no, it was not.
>
> I asked his girl friend, Tracey, I think, if that was her driver's license, or did she know who it belonged to. She said no.
>
> I asked Dominick Bretti if he knew who the driver's license belonged to, and he said no" (R 575).

It is sedentary principle of Federal law that when officers in the conduct of a lawful search discover "contraband or other things subject to seizure, they need not ignore what they discover, though the things discovered were not the things for which they were searching or for which they were entitled to search." **United States v. Lee**, 308 F. 2d 715 (C.A. 4th 1962); **Abel v. United States**, 362 U.S. 217 (1960).

Objects subject to valid seizure have been enumerated by this Court on many occasions. **Harris v. United States**, 331 U.S. 145 (1947). The instrumentalities and means by which a crime is committed as well as the fruits of a crime, such as stolen property, are traditionally among those valid objects of seizure. **Harris v. United States**, supra; **Carroll v. United States**, 367 U.S. 132, 158 (1925). The rule is upon the basis of preventive justice. **Jeffers v. United States**, 187 F. 2d 498 (C.A. D.C. 1950).

The license seized was in plain view of the officers; open and obvious to the naked eye. Petitioner disclaimed any knowledge of the license (R 575). In considering the validity of this seizure, this Court should not show itself unaware of the practical demands of effective criminal investigation and law enforcement, **Elkins v. United States**, 364 U.S. 206 (1960), nor ignore the fact that a driver's license is potentially a valuable document in an impersonalized society which trusts so deeply in official and quasi-official attestations of identity. In light of its great potential for unlawful use, Officer Ford would have been derelict in his duty under the circumstances if he had failed to take into custody the disclaimed driver's license. It should also be noted that the police were well aware that a rental car had been used and that frequently

forged or stolen driver's licenses are used to conceal the true identity of persons planning a crime.

The opinion of the District Court of Appeal of Florida, Third District, reported at 192 So. 2d 6 (Fla. App. 1966), is wholly consistent with this foregoing statement of law:

> "Under those circumstances, and because of the contraband nature of the item, its seizure was authorized.".

C. Mere Evidence

In **Warden v. Hayden,** 87 S.CT. 1642 (1967), the historical distinction between items of evidential value only and instrumentalities, fruits, or contraband was rejected. The basis of the rejection appears to be recognition by this Court that the principal object of the Fourth Amendment, the protection of privacy, is equally well served when the requirements of the Fourth Amendment are fulfilled, whether the search is for "mere evidence" or for fruits, instrumentalities or contraband.

Though **Warden v. Hayden,** supra, expressly did not enlarge the area of permissible searches, once a **lawful intrusion** upon privacy is made, "mere evidence" may properly be seized. In the present case, the initial intrusion upon privacy was made pursuant to the **consent** of the petitioner. The search was not a general exploration but was specifically directed to fruits of the crime and within the scope of consent. In the course of the lawful search, the disclaimed driver's license was seized properly, if for no reason more than its evidential value.

Again, the opinion of the lower court is wholly consistant with the principles stated above:

> "[I]ts [the license] evidentiary use, as a link in a chain of events connecting appellant with the robbery was only cumulative to other sufficient evidence thereof."

Petitioner cites **Preston v. United States,** 376 U.S. 364 (1964), and **Beck v. Ohio,** 379 U.S. 89 (1964), to support the contention that a permissible search, if made without a warrant must be incident to a lawful arrest. Petitioner overlooks the axiom that one may consent to a search without a search warrant. **United States v. MacLeod,** supra. Nor has respondent argued anywhere in proceedings below that the search was incident to a lawful arrest, thus rendering **Silverthrone Lumber Co. v. United States,** 251 U.S. 385 (1920); and **Agnello v. United States,** 269 U.S. 20 (1925), inapposite to the case at bar.

Petitioner discredits the force of **Warden v. Hayden,** 87 S.CT. 1642 (1967), because the police in the instant case could easily have secured a search warrant without any of the inherent dangers of waiting that were present in **Warden v. Hayden,** supra. This Court has stated, at least once, that "[T]he relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable." **United States v. Rabinowitz,** supra.

Petitioner's remaining authority tends to support the argument that waiver of constitutional rights must be freely, voluntarily and knowingly established. The evidence adduced at trial and reviewed herein, supra, clearly

demonstrates that voluntary consent was given by the petitioner. His own testimony forecloses the issue of coerced consent (SR 34-36).

Respondent summarizes:

(1) There was abundant evidence presented to the trial court that petitioner had given his free, voluntary and knowing consent to a search of his motel room;

(2) The trial court properly resolved the conflict of testimony in determining that petitioner did, in fact, give his voluntary consent;

(3) The search of petitioner's room after a lawful, consensual intrusion produced evidence linking petitioner with the crime charged; and

(4) Such evidence was the subject of a valid seizure whether it be considered in the nature of contraband or merely of evidential value.

ARGUMENT

II

APPLICABLE FEDERAL LAW IS CONSISTENT WITH THE FINDING OF THE DISTRICT COURT THAT THE PROSECUTION DID NOT COMMENT ON PETITIONER'S FAILURE TO TESTIFY IN HIS OWN BEHALF.

The thrust of petitioner's second argument, predicted

upon **Griffin v. California**, 380 U.S. 609 (1965), is that a comment by the prosecutor violated his right to remain silent at trial. The alleged violative comment follows:

> "Now we have got the furs; we have got the jewels; we have got the loot, and we have no reasonable explanation **at that time** to Capt. Morgan, either by **Ghelfi or Antone**" (R 1079), (Emphasis supplied).

The District Court of Appeal, held:

> "The comment by the prosecutor in argument on the failure of defendants to furnish reasonable explanation of possession of recently stolen property when discovered, did not amount to a comment by the prosecutor on failure of defendant's to testify in their own behalf at the time of trial. Romanello v. State, Fla. App. 1964 160 So. 2d 529; Miley v. State, Fla. App. 1966 186 So. 2d 299".

It is of paramount importance for this Court to note that the prosecutor did not refer to the petitioner, Bretti, in the above-quoted remark. His reference was clearly to Antone's and Ghelfi's failure to explain **their** possession of the recently stolen furs and jewels—keeping in mind that said articles were **never found** in Bretti's possession. Thus, Bretti can hardly argue that he was prejudiced when the prosecutor commented on inferences from the evidence relating solely to his co-defendants.

Further, a distinction of critical importance separates a prosecutor's comment made during trial, directed to

the defendant's failure to testify and a comment directed to the defendant's failure to give a reasonable explanation of recently stolen property, at the time he is discovered in possession.

While the former genus of comment infringes upon a sacrosanct right protected further by **Griffin v. California**, supra, the latter sort of comment was, at the time petitioner was tried, an orthodox technique of prosecution. **Nicholson v. United States**, 355 F. 2d 80 (C.A. 5th 1966); **Barnes v. United States**, 341 F. 2d 189 (C.A. 5th 1965); **Real v. United States**, 326 F. 2d 441 (C.A. 10th 1964); **McAbee v. United States**, 294 F. 2d 703 (C.A. D.C. 1961); **Wilson v. United States**, 162 U.S. 613 (1896).

The provisions of **Miranda v. Arizona**, 384 U.S. 436 (1966), are not applicable to petitioner's cause, although they might well apply to present prosecutions. See, **Young v. State**, 203 So.2d 650 (Fla. App. 1967). The judgment and sentence of petitioner was entered on November 6, 1965 (R 1193-1194). See, **Johnson v. New Jersey** 384 U.S. 719 (1966).

Section 918.09, Florida Statutes, F.S.A., and a long line of Florida cases attest eloquently to the zealous manner in which this state has protected defendants from comment by the prosecution on the accused's silence: Section 918.09, supra, provides, **inter alia**:

> ". . . [N]o accused person shall be compelled to give testimony against himself, nor shall any prosecuting attorney be permitted before the jury or court to comment on the failure of the accused to testify in his own behalf . . ."

In a myriad of varied circumstances, Florida courts have undertaken great pain to insure the defendant's right to remain silent. See, **Singleton v. State,** (Fla. App. 1966) 183 So. 2d 245, and case collected at 251, 252. In fact, **Flaherty v. State,** (Fla. App. 1966) 183 So. 2d 607, cited by petitioner, speaks to the protection of this same right, but to nothing further.

For the foregoing reasons, the prosecutor's comment was eminently correct, assuming arguendo, it had application to Bretti's case.

ARGUMENT

III

APPLICABLE FEDERAL LAW IS CONSISTENT WITH THE FINDING OF THE DISTRICT COURT THAT PETITIONER WAS FAIRLY TRIED.

The thrust of petitioner's third argument is that prejudicial pre-trial publicity prevented him from having the fair trial essential to due process.

The alleged prejudicial pre-trial publicity appeared on the morning of the second day of trial, and consisted of a single article in the **Miami Herald** (R 387).

At the outset of the trial, the trial judge strongly admonished the jury ". . . [N]ot to watch any television newscasts, nor read the newspaper insofar as it may make reference to this case . . ." (R 22), and again: ". . . [I]t is imperative that you do not expose yourselves to any

comment in the newspaper, on the radio or on the television, concerning this case" (R 22).

The next day the alleged prejudicial article appeared (R 26). The trial court determined that five out of six jurors in the panel had received the **Miami Herald** that morning but **no juror** had read anything about the case; nor read the article; nor discussed the article or heard it mentioned or discussed (R 31).

Further inquiry revealed that neither had any juror read any story underneath the allegedly prejudicial article, which involved some other alleged crime; nor had any juror read anything on the page where the pictures appeared (R 31). At the conclusion of the jury polling, petitioner made no objection (R 32).

The District Court of Appeal, in its opinion, held:

> "A newspaper article published during the trial, claimed by appellant to have been prejudicial was not a basis for mistrial. It was established by the trial judge upon inquiry of the jurors that they had not read the article, and they were admonished not to do so. Moreover, a mistrial motion was not made."

Surely, the right of a criminal defendant to a fair and impartial trial, free from prejudicial publicity, is an element of due process of law. **Rideau v. Louisiana,** 373 U.S. 723 (1963). However, stated as a general rule, cases involving claims of due process violation require a showing of identifiable prejudice to the accused. See, **Estes v. Texas,** 381 U.S. 532, 542 (1965).

The trial judge has large discretion in ruling on the issue of prejudice resulting from the reading by jurors of news articles concerning the trial, however; each case must turn on its own special facts. **United States v. Shaffer**, 291 F. 2d 689 (C.A. 7th 1961); **Marshall v. United States**, 360 U.S. 310 (1959).

In **Sheppard v. Maxwell**, 384 U.S. 333 (1966), this Court surveyed the relevancies of pre-trial publicity while deciding that the massive, pervasive and virulent publicity which surrounded the Sheppard trial constituted reversible error. In so doing, this court appraised "the totality of circumstances" in the case (384 U.S. at 352).

The "totality of circumstances," **Sheppard v. Maxwell**, supra, in the case sub judice, does not indicate an abuse of the "large discretion," **Marshall v. United States**, supra, vested in the trial court.

The record reflects emphatic admonishments by the trial court (R 22), a thorough interrogation on voir dire (R 20-32), and the absence of a motion for mistrial (R 32). With each case turning on "its own special facts", it is difficult to conceive of undivulged prejudice present in circumstances where not a single stone was left unturned.

In **Sheppard v. Maxwell**, supra, this Court ordered a new trial for Dr. Samuel Sheppard based in large measure, upon the deluge of publicity which **actually reached the jury.** In the present case, **not one juror** read the article in issue, yet petitioner argues that the trial court had a **duty** to examine the jurors separately to ascertain whether the article [which they had not read] prejudiced

him, citing **United States v. Accardo,** 298 F. 2d 133 (C.A. 7th 1962).

It should also be noted that petitioner neither requested separate polling nor moved for mistrial. These omissions should render **Accardo,** supra, inapplicable to the case at bar. Further, the procedure utilized by the lower court in permitting trial counsel to freely question the jury (R 31) provided petitioner with ample protection under the **Accardo** principles.

The "totality of circumstances" shows clearly that the trial judge did not abuse his large discretion.

ARGUMENT

IV

APPLICABLE FEDERAL LAW IS CONSISTENT WITH THE FINDING OF THE DISTRICT COURT THAT PETITIONER'S MOTION FOR SEVERANCE WAS PROPERLY DENIED.

The thrust of petitioner's fourth argument is that he was denied due process when the trial court refused to grant his motion for severance. The district court, in its opinion, stated succinctly: "No abuse of discretion was shown in the refusal of the trial judge to grant appellant a severance."

With respect to motions for severance, the question is always whether a joint trial infringes a defendant's right to a fundamentally fair trial. **United States v. Kahn,**

381 F. 2d 824 (C.A. 7th 1967). Both in the Federal courts and in Florida, this finding is discretionary with the trial court. Rule 14, Federal Rules of Criminal Procedure, 18 U.S.C.A.; **Opper v. United States,** 348 U.S. 84 (1954); **Shaffer v. United States,** 221 F. 2d 17 (C.A. 5th 1955); **United States v. Haupt,** 136 F. 2d 661 (C.A. 7th 1943); **Manson v. State,** (Fla. 1956) 88 So. 2d 272; **Jackman v. State,** (Fla. App. 1962) 140 So. 2d 627. Similarly, in both court systems, such discretion is subject to correction if abused. **United States v. Echeles,** 352 F. 2d 892 (C.A. 7th 1965); **Manson,** supra; **Jackman,** supra. Clearly federal and state law are in harmony about severance.

What constitutes such an abuse as to deprive the defendant of a fundamentally fair trial necessarily depends upon the facts in each particular case. **Brady v. United States,** 39 F. 2d 312, 313 (C.C.A. 8th 1930). The determination is made by asking whether it is within the jury's capacity, given the complexity of the case, to follow admonitory instructions and to keep separate, collate and appraise the evidence relevant only to each defendant. **United States v. Kahn,** supra; **Gorin v. United States,** 313 F. 2d 641, 646 (C.A. 1st 1963), cert. den., 374 U.S. 829 (1963); **United States v. Smith,** 209 F. Supp. 907, 914 (D.C. Ill. 1962); **United States v. Kahaner,** 203 F. Supp. 78 (D.C. N.Y. 1962).

The greatest difficulty in appraising evidence relavant to each defendant occurs when the **confession** of one defendant implicates the other. Petitioner stresses, **United States v. Haupt,** 136 F. 2d 661 (C.C.A. 7th 1943), and **Shaffer v. United States,** 221 F. 2d 17 (C.A. 5th 1955). The former case involved the trial of co-defendants where seventy-three pages of "highly incriminating" statements

made by one defendant were equally incriminating against other defendants (136 F. 2d at 672). The latter case, **Shaffer**, supra, also involved a trial of co-defendants where the confession of one implicated the other. The court said:

> "Like the Seventh Circuit in the case of United States v. Haupt, 136 F. 2d 661, 672, 'We doubt if it was within the realm of possibility for this jury to limit its consideration of the damaging effect of such statements merely to the defendant against whom they were admitted."

Petitioner has shown extreme examples of the need for severance in wholly unrelated fact patterns. An examination of the record sub judice reveals that petitioner and his co-defendant were united in a tri-partite scheme of robbery. Petitioner was postively identified as the man who rented the Falcon used in the robbery (R 698). The Anello driver's license, which had been used to rent the Falcon, was found in petitioner's motel room (SR 101). After three men were seen transferring certain property from a Falcon to a Cadillac belonging to a co-defendant (SR 71-73), the police arrested petitioner and co-defendants in an apartment which was rented by a co-defendant (SR 74-76). In the car belonging to a co-defendant, in which petitioner had arrived at the apartment, the police uncovered "a large quantity of jewelry" (SR 80-81). Under such circumstances, it would not have been in error to introduce such items of evidence against petitioner, had he been tried separately.

Because the facts of this particular case evidence the interwoven fabric for a tri-partite scheme of robbery,

in the absence of an incriminating statement or confession by one co-defendant which is bound to implicate another, or other such circumstances which might tend to deprive petitioner of a fundamentally fair trial, the denial of a motion for severance was properly within the trial court's ambit of discretion.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

EARL FAIRCLOTH, Attorney General,
State of Florida.

By _____
ARTHUR L. ROTHENBERG,
Asst. Attorney General,
State of Florida.

ARDEN M. SIEGENDORF,
Asst. Attorney General,
State af Florida.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1967

Case No._____

DOMINICK ANGEL BRETTI,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

CERTIFICATE OF MAILING

I HEREBY CERTIFY, that a copy of this Brief of Respondent in Opposition to the Petition for Certiorari to the Supreme Court of the United States was served upon Honorable Milton E. Grusmark, Attorney for Petitioner, 407 Lincoln Road, Miami Beach, Florida, by mailing a copy of same to him by United States Mail, First Class postage prepaid, pursuant to Rule 33 of this Court, this 10th day of February, 1968.

ARTHUR L. ROTHENBERG
Assistant Attorney General